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In The

Supreme Court of the United States

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WILBER HARDEN FOSTER,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

Petition for Writ of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

I. IS THE NORTH CAROLINA UNAUTHORIZED SUBSTANCE TAX A CRIMINAL PENALTY AND DOES THE PETITIONER'S SUBSEQUENT CONVICTION AND SENTENCE FOR POSSESSION OF THE SAME CONTROLLED SUBSTANCE UPON WHICH THE TAX WAS BASED VIOLATE THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION, THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, AND THE "LAW OF THE LAND" CLAUSE OF ARTICLE I, SECTION 17 OF THE NORTH CAROLINA CONSTITUTION?

II. WAS A MOTION TO SUPPRESS EVIDENCE OBTAINED BY A SEARCH WARRANT DATED MARCH 24, 1997 IMPROPERLY DENIED AND DID THE DENIAL OF THE PETITIONER'S MOTION TO SUPPRESS AND THE SUBSEQUENT JUDGMENT INCARCERATING THE DEFENDANT BASED ON THE EVIDENCE WHICH WAS NOT SUPPRESSED VIOLATE THE DEFENDANT'S FOURTH AMENDMENT RIGHT TO BE FREE FROM SEARCH AND SEIZURE WITHOUT PROBABLE CAUSE?

LIST OF PARTIES

All parties appear in the caption of the case and no parent corporations or subsidiaries exist in this litigation.

CORPORATE DISCLOSURE

There are no corporate parties to this appeal.

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The Opinion of the North Carolina Court of Appeals is styled, State v. Foster, No. COA 98-642, slip op. (N.C. App. April 6, 1999). The opinion has not been reported and it is included in the Appendix ("App."). A Petition to the Supreme Court of North Carolina and Petition for Writ of Certiorari made to the Supreme Court of North Carolina was denied in an Order styled State v. Foster, 198 P 99, slip op. (N.C. July 22, 1999), which is also not reported and is included in the Appendix.

STATEMENT OF JURISDICTION

The judgment of the North Carolina Court of Appeals was entered on April 6, 1999. The Petitioner thereafter, on April 28, 1999, filed a Notice of Appeal, Petition for Discretionary Review, Petition for Writ of Supersedeas, and Petition for Writ of Certiorari in the Supreme Court of North Carolina requesting that the Supreme Court of North Carolina review and reverse the decision of the North Carolina Court of Appeals. By order dated July 22, 1999, the Supreme Court of North Carolina denied the Petitioner's request to review the decision of the North Carolina Court of Appeals and entered an Order dismissing the appeal. State v. Foster, 198 P 99, slip op. (N.C. July 22, 1999) (App. 1). This Petition for a Writ of Certiorari is filed within 90 days of that date and the jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN CASE

U.S. Const., amend. IV

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

U.S. Const., amend. V

No person shall . . . be subject for the same offence to be put twice in jeopardy of life or limb . . . nor be deprived of life, liberty, or property, without due process of law . . ."

U.S. Const., amend. XIV, section 1

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law . . ."
N.C.G.S. § 105-113.105 (1997) et seq. (Text is set forth in pages 59-67 of the Appendix).

STATEMENT OF THE CASE

On March 24, 1997, Officer John T. Cobb of the Alamance County Sheriff's Department submitted an Application for Search Warrant with an attachment, alleging facts purporting to establish probable cause for the issuance of a search warrant. (App. 47). In the section entitled "Facts to establish probable cause," Officer Cobb alleged that, "[I]n the last twelve months, our division, along with Burlington P.D., confidential informants and sources has received information on Mr. Harden [sic] drug activity at his residence." (App. 54). The only other information used to support probable cause for the issuance of the warrant was the statement of Michael Grey Jeffrey, who after being arrested for possession of marijuana and weapons and after he had admitted that the drugs and weapons were his, alleged that he had gotten the marijuana from "Harden Wilber Foster" on March 22, 1997. (App. 54). The Officer stated in his affidavit that this statement by Jeffrey was made, "in hopes for assistance in the future and based on his declaration of penal interest." (App. 54). Based on the Application for Search Warrant, the magistrate issued a Search Warrant on March 24, 1997. (App. 49).

On March 24, 1997, officers from the Alamance County Sheriff's Department executed the Search Warrant at the residence of the Defendant and recovered various items listed in an Inventory of Seized Property. (App. 57). Included in these items were substances believed to be controlled substances. Based on the recovery of these items, the Defendant was arrested and charged with possession with intent to sell and/or deliver marijuana, possession of more than one and one-half ounces of marijuana, possession of cocaine, keeping or maintaining a dwelling for the purpose of using, keeping and/or selling cocaine, possession of cocaine with intent to sell and/or deliver, possession of drug paraphernalia, resist, obstruct and/or delay a public officer, and possession of non-tax paid whiskey.

As a result of the alleged possession of these controlled substances, one day following the date of offense, the North Carolina Department of Revenue issued a Notice of Controlled Substance Tax Assessment against Wilber Harden Foster that assessed "tax" on the seized controlled substances in the amount of $31,465.00, a "penalty" in the amount of $15,732.50 and "interest" in the amount of $235.99 for a total of $47,433.49. (App. 32). (The documents relating to the assessment of the Unauthorized Substance Tax, N.C.G.S. § 105-113.105 (1997) et seq., and the sale of property to satisfy this tax are found in the appendix and original certified copies are attached to Defendant's Motion for Appropriate Relief filed in the North Carolina Court of Appeals as an Appendix). A Certificate of Tax Liability certifying that Wilber Harden Foster was indebted to the State of North Carolina for these amounts was entered on the same day, March 25, 1997, and was filed in Alamance County, North Carolina on April 4, 1997. (App. 38). On that same date, March 25, 1997, a Warrant for Collection of Taxes was issued commanding that any property owned by Wilber Harden Foster be levied upon and sold to satisfy the tax assessment. (App. 40). Thereafter, on June 14, 1997, the North Carolina Department of Revenue conducted a sale of the Defendant's property to satisfy a portion of this tax. A "Noblia" mens watch, a mens diamond ring with a 1.14 carat diamond and a mens coin ring, dated 1881, all of which property was owned by the Defendant, was sold and the funds were delivered to the North Carolina Department of Revenue. (App. 45-46).

On April 21, 1997, the Defendant was indicted and arrested again for trafficking in a controlled substance by possessing more than 28 grams or more but less than 200 grams of cocaine. The controlled substance upon which the trafficking charge was based was the same controlled substance that was recovered in the search on March 24, 1997 upon which the previous arrest was based and upon which the assessment of the unauthorized substance tax was based.

On January 17, 1998, the Petitioner entered a plea of guilty to the charge of trafficking in cocaine and reserved his right to appeal. (App. 18-22). The Petitioner was thereafter placed into custody and released under a cash bond pending resolution of the matters of his appeal under certain terms and conditions. The Petitioner thereafter gave notice of appeal of the judgment sentencing him to a minimum active term of thirty-five months and a maximum active term of forty-two months as well as notice of appeal of a previous denial of a motion to suppress. On July 9, 1998, the Defendant filed a Motion for Appropriate Relief in the North Carolina Court of Appeals pursuant to N.C.G.S. § 15A-1415 (1997). (App. 23).

In an opinion filed April 6, 1999, the North Carolina Court of Appeals addressed the Defendant's Motion for Appropriate Relief on the merits and denied the motion, holding that although the United States Court of Appeals for the Fourth Circuit had found the North Carolina Unauthorized Substance Tax to be a criminal penalty, the Supreme Court of North Carolina had previously ruled differently and that the North Carolina Court of Appeals was constrained to follow the prior decision of the Supreme Court of North Carolina. Therefore, the North Carolina Court of Appeals found that "defendant's conviction following assessment of the controlled substance tax did not violate defendant's rights against multiple punishments of the same offense." State v. Foster, COA 98-642, slip op., (N.C. App., April 6, 1999). (App. 12). The North Carolina Court of Appeals also affirmed the trial court's decision in denying the Petitioner's motion to suppress. (App. 5-11).

REASONS FOR GRANTING THE WRIT

Introduction:

The North Carolina Court of Appeals has rendered an opinion in this case which they acknowledge is in direct opposition to the ruling of the United States Court of Appeals for the Fourth Circuit in the decision of Lynn v. West, 134 F.3d 582 (4th Cir. 1998), cert. denied, 119 S.Ct. 47 (1998). The Supreme Court of North Carolina has refused to review the decision and has decided cases prior to the case sub judice upon which the North Carolina Court of Appeals relied. This provides a basis for review under Rule 10(b) of the Rules of the Supreme Court of the United States.

The decision of the North Carolina Court of Appeals in this case is also in direct opposition to the of the rationale behind the decision of the Supreme Court of the United States in Department of Revenue v. Kurth Ranch, 511 U.S. 767 (1994) and as a result, a basis for review also exists under Rule 10(c) of the Rules of the Supreme Court of the United States.

1. THE NORTH CAROLINA UNAUTHORIZED SUBSTANCE TAX IS A CRIMINAL PENALTY AND THE CONVICTION AND SENTENCING OF THE PETITIONER FOR POSSESSION OF THE SAME CONTROLLED SUBSTANCE UPON WHICH THE TAX WAS BASED VIOLATES THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION, THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, AND THE "LAW OF THE LAND" CLAUSE OF ARTICLE I, SECTION 17 OF THE NORTH CAROLINA CONSTITUTION.

1. The North Carolina Unauthorized Substance Tax is a criminal penalty as defined by the federal courts.

In Department of Revenue v. Kurth Ranch, 511 U.S. 767 (1994), this Court considered the issue of whether a similar Montana drug tax was punitive. In Kurth Ranch, Montana law enforcement officers raided the farm of the Kurth's, seized marijuana plants, placed the Kurths under arrest, and charged them in a state court proceeding with drug charges. Id. at 767. After the Kurths pleaded guilty to drug charges, the Montana Department of Revenue attempted, in a separate proceeding, to collect a state tax imposed on the possession of dangerous drugs. Id. This Court held that, "Taken as a whole, this drug tax is a concoction of anomalies, too far-removed in crucial respects from a standard tax assessment to escape characterization as punishment for the purpose of double jeopardy analysis." Id. at 783. This Court then barred the enforcement of the Montana Drug Tax following a criminal proceeding, holding that, "it is a second punishment within the contemplation of a constitutional protection that has 'deep roots in our history and jurisprudence,' and therefore must be imposed during the first prosecution or not at all." Id. at 784 (quoting United States v. Halper, 490 U.S. 435, 440 (1989)). Despite the decision of this Court in Kurth Ranch and the marked similarity of the North Carolina statute to the Montana statute, the North Carolina Department of Revenue continued to enforce the North Carolina Unauthorized Substances Tax, N.C.G.S. § 105-113.105 (1997) et seq.

In Lynn v. West, 134 F.3d 582 (4th Cir. 1998), cert. denied 119 S.Ct. 47 (1998), the United States Court of Appeals for the Fourth Circuit addressed the issue of whether the North Carolina Unauthorized Substance Tax, N.C.G.S. 105-113.105 et seq., is a criminal penalty. As in the case sub judice, the Department of Revenue asserted that Defendant Lynn owed a tax of $200 per gram on the 970 grams of cocaine taken from his house. Id. at 584. The Court held that "the Drug Tax is in

reality a criminal penalty under Department of Revenue v. Kurth Ranch, 511 U.S. 767 (1994)." Id.

This Court discussed four features that caused the Montana tax in Kurth Ranch to be a criminal penalty: (1) the high tax rate, Id. at 780-81, (2) the deterrent purpose of the tax, Id., (3) the fact that the tax was conditioned on the commission of a crime, Id. at 781-82, and (4) the fact that the tax was levied on "'possession' of goods that no longer exist and that the taxpayer never lawfully possessed." Id. at 783. The Court of Appeals for the Fourth Circuit discussed each of these factors and found that the North Carolina Unauthorized Substance Tax was even more punitive than the Montana tax analyzed in Kurth Ranch. Lynn v. West, 134 F.3d 582, 589 (4th Cir. 1998). The Court of Appeals for the Fourth Circuit found as to the first issue that, "The rate of taxation imposed by the North Carolina Drug Tax yields an even higher penalty than the tax in Kurth Ranch." Id. As to the second factor, the court found that, "The addition of the penalty makes the effective rate of taxation 1,600 percent, or sixteen times the market value." Id. at 590. As to the third factor, the court found that the North Carolina tax, like the Montana tax, was conditioned on the commission of a crime. Id. Finally, the North Carolina Unauthorized Substance Tax, like the Montana tax, has no relationship to lawful possession. Id. at 591. The Court of Appeals for the Fourth Circuit cited the Kurth Ranch decision where this Court held that "[a] tax on 'possession' of goods that no longer exist and that the taxpayer never lawfully possessed has an unmistakable punitive character." Id., citing Department of Revenue v. Kurth Ranch, 511 U.S. 767, 783 (1994).

Other courts have followed the rationale applied in Lynn. The Supreme Court of Massachusetts decided the case of Commissioner of Revenue v. Mullins, 428 Mass. 406, 702 N.E.2d 1 (1998) in which it followed the analysis of the federal courts and found that the controlled substance tax in Massachusetts was a criminal penalty for purposes of double jeopardy analysis. Id. at 8.

In the case sub judice, unlike Kurth Ranch, the criminal punishment imposed by the North Carolina Unauthorized Substance Tax occurred prior to the punishment for the criminal proceeding. As a result, it is the subsequent criminal punishment under the State criminal proceedings that is in violation of the Double Jeopardy Clause of the United States Constitution. In Lynn, like the present case, the punishment under the criminal charges was imposed subsequent to the imposition of the Drug Tax. The Court held that the Double Jeopardy clause did not apply only because the subsequent prosecution was brought by the United States rather than the State of North Carolina. Lynn, 134 F.3d 582, 593. Since the criminal prosecution in the present case was brought by the State of North Carolina, the subsequent indictment and punishment for the criminal offenses by the State of North Carolina after the imposition of the Unauthorized Substance Tax by the State of North Carolina violates the Double Jeopardy Clause of the fifth amendment and the Due Process Clause of the fourteenth amendment. The fact that the prior punishment was a "tax" assessment is of no consequence. The United States Government argued in United States v. Halper, 490 U.S. 435 (1989) that the constitutional prohibition against multiple punishments, "applied only to punishments meted out in a criminal proceeding." Department of Revenue v. Kurth Ranch, 511 U.S. 767, 802 (Justice Scalia dissenting, citing Brief for United States in United States v. Halper, O.T.1988, No. 87-1383, pp. 11-12, 21-24.) Even Justice Scalia in his dissent in Kurth Ranch held that, "[I] found, and continue to find, that distinction incoherent. If the Constitution prohibits multiple punishments, the nature of the proceeding in which punishment is imposed should make no difference." Kurth Ranch, 511 U.S. at 802. However, despite the ruling of this Court, the North Carolina Department of Revenue completely disregarded the decision in Kurth Ranch and continued thereafter to enforce the North Carolina Unauthorized Substance Tax.

2. The Petitioner has not waived his right to collateral relief as a result of his guilty plea.

As a general rule, when a Defendant enters a guilty plea, he waives his right to attack his sentence collaterally through a double jeopardy challenge. United States v. Broce, 488 U.S. 563 (1989). There are exceptions to this general rule. One exception exists if the plea was not entered knowingly and voluntarily. Id. Another exception exists if the government had no right to bring the charges at all. Id.; see also Menna v. New York, 423 U.S. 61 (1975); Blackledge v. Perry, 417 U.S. 21 (1974); United States v. Brown, 155 F.3d 431 (4th Cir. 1998). Another exception exists where the state appellate court addressed the double jeopardy issue on appeal, despite the Petitioner's failure to raise double jeopardy objections at the trial court level. Brown v. Foltz, 583 F.Supp. 1063 (E.D.Mich 1984), aff'd, 754 F.2d 372 (1985); see Cook v. Borden Kircher, 602 F.2d. 117 (6th Cir 1979), cert. denied, 444 U.S. 936 (1979); Hockenbury v. Sowders, 620 F.2d 111 (6th Cir. 1980), cert. denied, 450 U.S. 933 (1981). Another exception exists when the record does not reflect that the Petitioner "understandably and knowingly" waived the state court's consideration of the defense. See Alvarez v. Estelle, 531 F.2d 1319, 1321 (5th Cir. 1976), rehng. denied, 534 F.2d 1407, cert. denied, 429 U.S. 1044 (1977), rehng. denied, 429 U.S. 1124 (1977).

1. The Petitioner did not "knowingly and understandably" waive the state court's determination of a "known right or privilege."

A basis for collateral review lies in the fact that the Defendant did not knowingly and understandably waive the state court's determination of a federal double jeopardy claim. "The classic definition of waiver enunciated in Johnson v. Zerbst, 304 U.S. 458, 464, 'an intentional relinquishment or abandonment of a known right or privilege,' furnishes the

controlling standard." Fay v. Noia, 372 U.S. 391, 439 (1963), quoting, Johnson v. Zerbst, 304 U.S. 458, 464 (1938). At the time that the Defendant was charged, the North Carolina appellate courts had recently addressed the issue of whether or not the North Carolina Controlled Substance Tax was a criminal penalty in the cases of State v. Ballenger, 123 N.C. App. 179, 472 S.E.2d 572 (1996), aff'd, 345 N.C. 626, 481 S.E.2d 84, cert. denied, 139 L.Ed.2d 29 (1997) and State v. Creason, 123 N.C. App. 495, 473 S.E.2d 771 (1997), aff'd, 346 N.C. 165, 484 S.E.2d 525 (1997). Despite the ruling of this Court in Department of Revenue v. Kurth Ranch, 511 U.S. 767 (1994), the North Carolina appellate courts held that the North Carolina Unauthorized Substance Tax was not a criminal penalty. The North Carolina Court of Appeals was divided in the Ballenger decision and the North Carolina Supreme Court affirmed the divided majority decision per curiam. 345 N.C. 626, 481 S.E.2d 84, cert. denied 139 L.Ed.2d 29 (1997). In Lynn v. West, 134 F.3d 582 (4th Cir. 1998), cert. denied, 119 S.Ct. 47 (1998), the United States Court of Appeals for the Fourth Circuit established that the North Carolina Unauthorized Substance Tax was in fact a criminal penalty. The decision of the Fourth Circuit Court of Appeals in the Lynn case was based on the same statute that the North Carolina Supreme Court considered in the Ballenger case. The North Carolina appellate courts have firmly established the view that North Carolina courts "[are] not bound by the pronouncements of the United States Circuit Courts." Haynes v. State, 16 N.C. App. 407, 192 S.E.2d 95 (1972). Consequently, to deem the Defendant's failure to raise the double jeopardy claim at trial and his guilty plea a bar to raising the issue collaterally for eventual consideration by a federal court would require a Defendant to bring a case to trial on all charges, solely for the purpose of raising a defense which North Carolina courts had definitively said did not exist and would presumably deem frivolous. Regardless of how the federal courts might rule on the issue, the North Carolina appellate courts refused to recognize, and

continue to refuse to recognize and follow the ruling of the federal circuit court in the Lynn case and the rationale of this Court in the Kurth Ranch decision, and do not consider them binding upon state court proceedings. To take his case to trial or to refuse a plea offer, merely to set forth a defense at the state court level which the state courts would, under state law, deem directly contrary to a recently decided North Carolina Supreme Court case, would subject the Defendant to any potential punishment available for the crimes charged, whether or not those crimes were truly subsequent criminal penalties that violated his rights under the fifth amendment. The Defendant would then be left to hope that his case would be reviewed by a federal court. This Court has recognized that when a defendant does not appeal an issue because of the possibility of a more severe sentence on retrial, this does not necessarily constitute a "waiver" of a defense that is asserted collaterally for purposes of relief from the underlying sentence. Fay v. Noia, 372 U.S. 436, 439 (1963).

The fact that the Petitioner did not assert a double jeopardy claim at trial cannot constitute "an intentional relinquishment or abandonment of a known right or privilege," since there was no "known right or privilege" at the state court level because the North Carolina Supreme Court has set forth its position on the North Carolina Unauthorized Substance Tax and has deemed that position to be paramount over any contrary view that had been or would be expressed by the federal circuit courts.

2. The North Carolina Court of Appeals addressed the Petitioner's claim of double jeopardy on the merits.

When a state appellate court reaches the issue of a double jeopardy argument raised in a motion for collateral relief, the issue is proper for review by a federal court, despite what might otherwise be deemed a procedural waiver of that

personal defense. Brown v. Foltz, 583 F.Supp. 1063 (1984), aff'd, 754 F.2d 372 (1985), see also Cook v. Borden Kircher, 602 F.2d 117 (6th Cir. 1979), cert. denied, 444 U.S. 936 (1979). On direct appeal for review of a state court decision, there is a presumption that a state court's dismissal of a petition for collateral relief does not rest on an independent and adequate state ground and that the state court has rejected the petitioner's federal claims on the merits." Michigan v. Long, 463 U.S. 1032 (1983). The presumption in favor of federal review applies when it appears that the state court judgment was interwoven with federal law. Id.; see also Coleman v. Thompson, 501 U.S. 722 (1991).

In the present case, the North Carolina Court of Appeals addressed the Petitioner's Motion for Appropriate Relief in which he asserted that his subsequent conviction violated his right against being placed twice in jeopardy for the same offense and his due process rights which are accorded to citizens by the fifth and fourteenth amendments to the United States Constitution. The North Carolina Court of Appeals chose to address the issue on its merits and denied the Petitioner's request, noting that it was doing so in direct opposition to a recent federal decision by the United States Court of Appeals for the Fourth Circuit. When a state appellate court reaches a double jeopardy issue raised in a motion for collateral relief, the issue is proper for review by a federal court, despite what might otherwise be deemed a procedural waiver of that personal defense. Brown v. Foltz, 583 F.Supp. 1063 (1984), aff'd 754 F.2d 372 (1985). As a result, the issue is properly before this Court for review of the continued refusal of the North Carolina appellate courts to accept the law of our federal courts interpreting the North Carolina Unauthorized Substance Tax as a criminal penalty.

II. THE MOTION TO SUPPRESS THE EVIDENCE OBTAINED BY THE SEARCH WARRANT DATED MARCH 24, 1997 WAS IMPROPERLY DENIED BY THE NORTH CAROLINA STATE COURTS AND THE DENIAL OF THE PETITIONER'S MOTION TO SUPPRESS AND THE SUBSEQUENT JUDGMENT INCARCERATING THE DEFENDANT BASED ON THE EVIDENCE WHICH WAS NOT SUPPRESSED VIOLATES THE DEFENDANT'S FOURTH AMENDMENT RIGHT TO BE FREE FROM SEARCH AND SEIZURE WITHOUT PROBABLE CAUSE.

In Illinois v. Gates, 462 U.S. 213 (1983), this Court established the modern test for determining whether a search warrant is supported by probable cause. The existing "two-pronged test" was abandoned and a totality of the circumstances analysis of probable cause was adopted. Id. at 238-39. This analysis was adopted by the North Carolina Supreme Court in State v. Arrington, 311 N.C. 633 (1984).

In the case sub judice, there is no personal knowledge by the officer regarding witnessing any controlled buy or drug traffic at the residence, and there is no allegation that the Defendant has any prior record for selling drugs. The only two sources of information are the information provided by an individual, Michael Grey Jeffrey, who had previously been arrested for possession of a controlled substance, and a reference to confidential (but not reliable) informants.

1. Information provided by confidential informants in the affidavit is insufficient to contribute to a finding of probable cause to believe that controlled substances would presently be found at the Defendant's residence.

When officers use information that they have received from a confidential informant, they have a greater burden to show that the person is credible and that the information is reliable than when they receive information from a crime victim, an uninterested witness, or from a "citizen-informant." United States v. Foolade, 703 F.2d 180 (5th Cir. 1983); United States v. Phillips, 727 F.2d 392 (5th Cir. 1984). This is especially true when the confidential informant is presumably involved in criminal activity or is associated with the criminal environment. Id. While an affidavit may be based on hearsay information, "the affidavit in such case must contain some of the underlying circumstances from which the affiant's informer concluded that the articles sought were where the informer claimed they were, and some of the underlying circumstances from which the affiant concluded that the informer was credible and his information reliable." State v. Dailey, 33 N.C. App. 600, 602; 235 S.E.2d 917, 919, appeal dismissed, 293 N.C. 362, 237 S.E.2d 850 (1977); quoting State v. Campbell, 282 N.C. 125, 129, 191 S.E.2d 752, 755 (1972).

In the warrant in the present case, the application makes no statements regarding the underlying circumstances from which the confidential informant concluded that there were drugs in the residence or how the informant gained this purported knowledge, nor does it make a statement regarding the reliability of the confidential informant. Moreover, it makes no statement regarding the time frame in which the confidential informant's statements were made, except to state that they were made in the last twelve months. These statements have no assurances of credibility and, even if credible, would be stale. A confidential informant is not

reliable without information regarding the past performance of the informant or some other means of verifying the information provided. United States v. Delgadillo-Velasquez, 856 F.2d 1292 (9th Cir. 1988). Thus, the information provided by the "confidential sources" in the application in the present case does not further the allegation that there is probable cause to believe that contraband could then be found on the subject premises.

2. Information provided by Michael Grey Jeffrey lacks sufficient credibility to stand alone as a basis for probable cause to search a residence.

The only other basis for the warrant is the statement by Michael Grey Jeffrey. Mr. Jeffrey is not a crime victim, an uninterested witness or "citizen-informant." Generally, officers applying for a search warrant may state information in the affidavit that they have received from a crime victim, witness, or other "citizen-informant" without indicating that person's credibility or reliability, unless the person has a motive to falsify information or unless other circumstances indicate that the person's credibility or information is questionable. United States v. Foolade, 703 F.2d 180 (5th Cir. 1983) (emphasis added); There is no allegation of underlying circumstances from which the affiant concluded that the informer was credible and his information reliable.

The applicant attempts to remedy this obvious flaw by stating that, "[T]his information was given by Michael Grey Jeffrey in hopes for assistance in the future and based on his declaration of penal interest ." (App. 54). While statements made against penal interest have been held to supply credibility to the person making the statement, the statement by Jeffrey is not a statement against penal interest so as to lend sufficient credibility to his statements.

The declarant Jeffrey was not making a statement against penal interest because he was already caught with the

drugs in his home. Jeffrey had previously admitted to the police that the controlled substances in his home belonged to him. At the suppression hearing, officer Cobb testified as follows:

17. Okay. And (sic) Mr. Jeffries (sic) acknowledged that both the contraband and the weapons were his, did he not?
1. Yes, sir.
17. From the get-go, from the beginning, did he not?
1. Yes, sir.
17. Okay.
1. He never denied it.
17. Before he really told you anything else, —
1. Uh-huh.
17. — correct? Now at some point after he acknowledged that the drugs and all were his, he then related to you that he could tell you his source?
A. Source, yes, sir.

By stating later that he had obtained the drugs from another individual, Jeffrey was merely stating the obvious. Every person who possesses a controlled substance obtained it from another individual, unless the individual possessing the controlled substance manufactured the controlled substance himself. Stating that the controlled substance was obtained from another individual does not expose Jeffrey to any additional criminal charges. In fact, if the controlled substance were manufactured by Jeffrey rather than obtained from some other person, that penal penalty would be even more serious.

Allowing self-serving information given by a possessor of drugs and weapons, standing alone, to provide probable cause to search an individual's residence, is a tremendous intrusion into the rights of individuals to be free of search and seizure in their homes without probable cause. There are numerous false allegations made by individuals in the jails who

have been arrested on drug charges. These allegations, like those made by Jeffrey, carry no risk of additional penal punishment to the person who made the statement, since the person has already been located with the drugs. Jeffrey admitted no involvement in a crime other than that which was already known. The fact that Jeffrey had a source was known by the police, unless Jeffrey manufactured the controlled substances himself. Only the identity of his alleged source was unknown. Revealing this identity did not subject Jeffrey to any additional penal punishment and does not fall within the "common sense" definition of a statement against penal interest. Consequently, his statement does not contain the additional assurance of reliability that is deemed to accompany true statements against penal interest.

If information such as that supplied in the Search Warrant Application in the present case were adjudged to provide probable cause, then all of the people who are mentioned by individuals in the jails as being drug sources, whether or not they have a record for dealing in drugs, are subject to having their residences searched pursuant to a search warrant. There would be no need for police to set up surveillance to check for drug traffic or set up a controlled drug purchase after any drug dealer or drug user names an individual as a drug source. The information would not even need to be corroborated by a single confidential reliable source. Instead, police may immediately obtain a search warrant and enter the home of that individual.

Certainly, the Gates standard has loosened the criteria that a search warrant application must meet to establish probable cause. These affidavits should not be interpreted "in a hypertechnical, rather than a commonsense, manner." Illinois v. Gates, 462 U.S. 213, 236 (1983) (quoting United States v. Ventresca, 380 U.S. 102, 109 (1965)). However, the fourth amendment still establishes a line between sufficient and insufficient police investigation before making an application to search the residence of a citizen. The "commonsense"

definition of a statement against penal interest is a statement that carries some additional credibility because it carries an actual risk of increased criminal punishment to the declarant. The statement by Jeffrey in the present case offers no such assurances of reliability and should not establish probable cause.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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Supreme Court, U.S.
FILED

No. 99 659 OCT 18 1999

OFFICE OF THE CLERK

In The

Supreme Court of the United States

WILBER HARDEN FOSTER,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

Appendix to Petition for Writ of Certiorari

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No. 198P99 FIFTEEN-A DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

(*State v. Wilber Harden Foster*)

STATE OF NORTH CAROLINA

v.

WILBER HARDEN FOSTER

From NC Court of Appeals
(COA98-642)
From Alamance
(97CRS7485-91, 97CRS9883)
FILED: JULY 28, 1999
ENTERED: JULY 28, 1999

****

ORDER

Upon consideration of the petition filed by Defendant for Writ of Supersedeas of the judgment of the Court of Appeals in this matter, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

**"Denied by order of the Court in conference,
this the 22nd day of July 1999.
s/Wainwright, J.
For the Court"**

Upon consideration of the notice of appeal from the North Carolina Court of Appeals, filed by the Defendant in this matter pursuant to G.S. 7A-30, and the motion to dismiss the appeal for lack of substantial constitutional question filed by the Attorney General, the following order was entered

and is hereby certified to the North Carolina Court of Appeals: the motion to dismiss the appeal is

"Allowed by order of the Court in conference,
this the 22nd day of July 1999.
s/Wainwright, J.
For the Court"

Upon consideration of the petition filed by Defendant in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference,
this the 22nd day of July 1999.
s/Wainwright, J.
For the Court"

Upon consideration of the petition filed by Defendant in this matter for a writ of certiorari to review the decision of the North Carolina Court of Appeals, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference,
this the 22nd day of July 1999.
s/Wainwright, J.
For the Court"

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 28th day of July 1999.

/s/Christie Speir Cameron
Clerk, Supreme Court of North Carolina

Copy to:
North Carolina Court of Appeals
Mr. James F. Walker, Attorney at Law, For Foster
Mr. Daniel S. Bullard, Attorney at Law, for Foster
Mr. John J. Aldridge, III, Assistant Attorney General, For State
Mr. Robert F. Johnson, District Attorney
Ms. Louise B. Wilson, Clerk of Superior Court
Mr. Ralph A. White, Appellate Court Reporter
West Publishing Company
Lexis-Nexis

No. COA98-642

North Carolina Court of Appeals

****

STATE OF NORTH CAROLINA

v.

WILBUR HARDEN FOSTER}
Defendant.

From Alamance
(97-CRS-7485-91, 97-CRS-9883)
FILED: APRIL 7, 1999
ENTERED: APRIL 7, 1999

****

ORDER

The following order was entered:

The motion filed in this cause on the 9th day of July 1998 and designated "Motion for Appropriate Relief" is denied. See opinion filed 6 April 1999.

By order of the Court this the 6th day of April 1999.

Witness my hand and official seal this the 7th day of April 1999.

/s/John H. Connell
Clerk of North Carolina Court of Appeals

cc:
Mr. James F. Walker
Ms. Daniel S. Bullard
Mr. John H. Aldridge

NORTH CAROLINA COURT OF APPEALS

STATE OF NORTH CAROLINA

v.

WILBER HARDEN FOSTER
Defendant.

Alamance County
No. 97 CRS 7485-7491,
97 CRS 9883
NO. COA98-642
FILED: APRIL 6, 1999
ENTERED: APRIL 6, 1999

MEMORANDUM OPINION

Appeal by defendant from judgment entered 26 January 1998 and order entered 18 March 1998 by Judge J.B. Allen, Jr., in Alamance County Superior Court. Heard in the Court of Appeals 24 February 1999.

Attorney General Michael F. Easley, by Assistant Attorney General John J. Aldridge, III, for the State.

Walker & Bullard, by Daniel S. Bullard and James F. Walker, for defendant-appellant.

MARTIN, Judge.

On 22 March 1997, Officer John Cobb of the Alamance County Sheriff's Department executed a search warrant for the home of Michael Jeffrey and found Jeffrey in possession of marijuana and cocaine. Jeffrey told Officer Cobb that he had purchased the drugs earlier that same day from defendant at defendant's residence. Officer Cobb and

other officers had received information from confidential informants over the preceding year that defendant was selling drugs from his residence. Jeffrey gave Officer Cobb a detailed description of defendant's residence as well as the vehicles which Jeffrey said would be located there. Officer Cobb then drove by defendant's residence to confirm the descriptions provided by Jeffrey and determined they were accurate.

On 24 March 1997, Officer Cobb applied for a search warrant to search defendant's residence. The application described the residence and its location with specificity, recounted Officer Cobb's experience in controlled substances law enforcement, described the property to be seized as "marijuana or any other controlled substance," and recited the information provided by Jeffrey as well as the information obtained from confidential informants to support Officer Cobb's belief there was probably cause to believe controlled substances could be located at defendant's residence.

A magistrate issued the search warrant and it was executed on 24 March 1997. The officers found defendant present at the residence and seized a quantity of marijuana, 76.6 grams of cocaine, a quantity of non-tax paid liquor, three shotguns, two automatic handguns, and other drug paraphernalia. Defendant was arrested and charged with several violations of controlled substances laws and related offenses.

Defendant entered pleas of not guilty and moved to suppress evidence seized during the search of his residence on the grounds the search warrant was invalid. After a hearing, the motion to suppress was denied and defendant entered a plea of guilty to trafficking in cocaine, reserving his right to appeal the denial of his motion to suppress.

Defendant's single assignment of error is directed to the denial of his motion to suppress the evidence seized during the search of his residence. He contends the search warrant was invalid because the application for the warrant

(1) did not contain an explicit statement that there was probable cause to believe the items subject to seizure were located at defendant's residence, and (2) did not set forth facts and circumstances sufficient to establish probable cause to believe the controlled substances were presently located at his residence.

"The scope of review on appeal of the denial of a defendant's motion to suppress is strictly limited to determining whether the trial court's findings of fact are supported by competent evidence, in which case they are binding on appeal, and in turn, whether those findings support the trial court's conclusions of law." *State v. Corpening,* 109 N.C. App. 586, 587-88, 427 S.E.2d 892, 893 (1993) (citing *State v. Cooke,* 306 N.C. 132, 291 S.E.2d 618 (1982)); *State v. Fleming,* 106 N.C. App. 165, 415 S.E.2d 782 (1992).

Constitutional and statutory provisions require that a search warrant be based on probable cause. U.S. Const. amend. IV; N.C. Gen. Stat. §15A-244 (1977). *See State v. Riggs,* 328 N.C. 213, 400 S.E.2d 429 (1991); *State v. Crawford,* 104 N.C. App. 591, 410 S.E. 2d 499 (1991). "The standard definition of probable cause is reasonable grounds to believe a search of the premises would produce the objects sought and that the objects would aid in the apprehension or conviction of the offender." *Crawford,* at 595, 410 S.E.2d at 501 (citing *State v. Arrington,* 311 N.C. 633, 319 S.E.2d 254 (1984)). Each application for a search warrant must be made in writing upon oath or affirmation. All applications must contain:

> (1) The name and title of the applicant; and
> (2) A statement that there is probable cause to believe that items subject to seizure under G.S. 15A-242 may be found in or upon a designated or described place, vehicle, or person; and

(3) Allegations of fact supporting the statement. The statements must be supported by one or more affidavits particularly setting forth the facts and circumstances establishing probable cause to believe that the items are in the places or in the possession of the individuals to be searched; and

(4) A request that the court issue a search warrant directing a search for and the seizure of the items in question.

N.C. Gen. Stat. §15A-244 (1997).

Defendant first contends the application for the search warrant did not comply with G.S. §15A-244(2), requiring a particularized statement of probable cause, because it failed to state that probable cause existed to believe that items sought were located at a designated place. Defendant quotes from the portion of Officer Cobb's affidavit entitled "Facts to Establish Probable Cause, " in which the officer stated "based on the totality of circumstances stated above from both a confidential source an [sic] also the Information from Michael Grey Jeffrey and the marijuana located this affiant believes there is probable cause to believe that the seized marijuana came from the above described location." Based upon this single line of the affidavit, defendant argues the application stated only the source of the marijuana found in Mr. Jeffrey's possession, but failed to state that probable cause existed to believe that other illegal drugs were probably located at defendant's residence. After reviewing the entire application, we find no merit to defendant's argument.

The AOC form application for the search warrant, as completed by Officer Cobb, explicitly states:

> There is probable cause to believe that *[the items to be seized as described in the attachment to the application]* constitutes evidence of a crime and the identity of a crime and the identity of a crime and the identity of a person participating in a crime, in violation of the N.C. Controlled Substance Act, and is located in the following premises, 1523 Hanford Road, Graham, ...

The attachment describes the property to be seized as:

> Marijuana and any other controlled substance. Also any paraphernalia such as scales, packaging materials, and any containers used to package or store marijuana. Any and all other materials not otherwise listed above which are the fruits instrumentalities and/or evidence of violations of the general statutes.

In addition, Officer Cobb's affidavit states that Jeffrey could show the officer "this residence where the marijuana had came from." We hold the application, when read in its entirety, complies with G.S. §15A-244(2).

Defendant next contends the application for the search warrant failed to establish probable cause because the information provided by confidential informants was insufficient to contribute to a finding of probable cause to search and the information provided by Jeffrey lacked sufficient credibility, standing alone, to establish probable cause. We disagree.

Determination of probable cause is a pragmatic question framed within the context of the type of offense and the existing facts and circumstances. *State v. Allen,* 282 N.C. 503, 194 S.E.2d 9 (1973). "[R]esolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants." *United States v.*

Ventresca, 380 U.S. 102, 109, 13 L.Ed.2d 684, 689 (1965). On appeal, broad discretion is given to the lower court's determination of probable cause, and its conclusion should be sustained if there existed a substantial basis to believe the purpose of the warrant would probably be fulfilled. *State v. Vestal,* 278 N.C. 561, 180 S.E.2d 755 (1971); *State v. Crawford,* 104 N.C. App. 591, 410 S.E.2d 499 (1991). An affidavit founded upon hearsay must contain underlying circumstances of reliability and provide the basis for the declarant's belief that the search will accomplish its purpose. *State v. Campbell,* 282 N.C. 125, 191 S.E.2d 752 (1972); *Crawford,* supra.

"[T]he ordinary citizen who has never before reported a crime to the police, may, in fact, be more reliable than one who supplies information on a regular basis." *United States v. Harris,* 403 U.S. 573, 599, 29 L.Ed.2d 723, 743 (1971) (Harlan, J., dissenting). The North Carolina Supreme Court has followed the trend of demanding higher standards of reliability for paid police informants than for private citizens voluntarily assisting the police. *State v. Sanders,* 327 N.C. 319, 395 S.E.2d 412 (1990); *State v. Martin,* 315 N.C. 667, 340 S.E.2d 326 (1986). Information from victims of crimes, disinterested witnesses, or citizen informants is given more weight than information from paid or confidential informants. *State v. Sanders,* supra; *State v. Martin,* supra.

However, the source of the information must be viewed in light of the totality of facts and circumstances. The United States Supreme Court determined that when deciding whether information received from a confidential informant properly forms the basis of probable cause to search or arrest, courts must review the "totality of the circumstances." *Illinois v. Gates,* 462 U.S. 213, 238, 76 L.Ed. 2d 527, 548, *reh'g denied,* 463 U.S. 1237, 77 L.Ed. 2d 1453 (1983); see *State v. Riggs,* 328 N.C. 213, 400 S.E. 2d 429 (1991) (North Carolina Supreme Court has accepted *Gates* as appropriate standard for showing probable cause

under both federal and state constitutions). The Court emphasized that "[o]ur decisions applying the totality-of-the-circumstances analysis... have consistently recognized the value of corroboration of details of an informant's tip by independent police work." *Gates,* 462 U.S. at 241, 76 L.Ed.2d at 550. The Court emphasized that "probable cause does not demand the certainty we associate with formal trials." *Id.* at 246, 76 L.Ed. 2d at 553. Therefore, probable cause exists if there is a "fair probability" that a confidential informant has personal knowledge of criminal activity; and corroboration of "major portions of the [informant]'s predictions provides just this probability." *Id.*

Applying these principles, we conclude the application of the search warrant in the present case is sufficient to establish probable cause. Officer Cobb's affidavit was based upon information provided by Michael Jeffrey who admitted, in a declaration against penal interest, that the drugs found in his possession came from defendant's residence, thus setting out the context and underlying basis of Officer Cobb's information concerning the presence of illegal drugs in defendant's residence. Officer Cobb stated in his affidavit that he had corroborated information given him by Jeffrey with respect to defendant's residence ("The above information has been determined to be true and accurate..."). Jeffrey's statement that he had purchased drugs from defendant at -his residence was further corroborated by information which Officer Cobb and other officers had received from confidential sources. Under these facts and circumstances we conclude there were "reasonable grounds to a search of the premises would produce the objects sought and that the objects would aid in the apprehension or conviction of the offender." *State v. Crawford,* 104 N.C. App. 491, 595, 410 S.E.2d 499, 501, (1991).

Defendant's Motion For Appropriate Relief

Defendant has also filed a motion for appropriate relief in this Court in which he asserts that he was assessed a North Carolina Controlled Substance Tax in the amount of $47,433.49 pursuant to G.S. §105-113.105 *et seq.* Upon the controlled substances found in his possession. He argues that his conviction following the imposition of the tax violates the United States and North Carolina constitutional guarantees against double jeopardy. The issue has been decided against him in *State v. Ballenger*, 123 N.C. App. 179, 472 S.E.2d 572 (1996), *affirmed,* 345 N.C. 626, 481 S.E.2d 84, *cert. denied,* 139 L.Ed. 2d 29 (1997); *State v. Creason,* 123 N.C. App. 495, 473 S.E.2d 771 (1996), *affirmed,* 346 N.C. 165, 484 S.E.2d 525 (1997). Though the United States Court of Appeals for the Fourth Circuit has found the North Carolina Controlled Substance Tax to be a criminal penalty rather than a revenue tax, *Lynn v. West,* 134 F.3d 582 (4th Cir. 1998), *cert. denied,* 142 L.Ed.2d 356 (1998), we are constrained to follow the decision of the Supreme Court of North Carolina upholding the statute. *Haynes v. State*, 16 N.C. App. 407, 192 S.E.2d 95 (1972). Thus, we hold that defendant's conviction following assessment of the controlled substance tax did not violate defendant's rights against multiple punishments of the same offense, and his motion for appropriate relief is denied.

Affirmed; motion for appropriate relief denied.
Judges TIMMONS-GOODSON and HUNTER concur.
Report per Rule 30(e).

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

STATE OF NORTH CAROLINA
COUNTY OF ALAMANCE

STATE OF NORTH CAROLINA	)
	)
vs.	)
	)
WILBER HARDEN FOSTER,	)
Defendant.	)
	)

97 CRS 7485-7491, 9883
FILED: MARCH 18, 1998
ENTERED: MARCH 18, 1998

ORDER

THIS MATTER HAVING PROPERLY COME BEFORE THE COURT on January 9, 1998 through the Defendant's *Motion to Suppress* filed on May 13, 1997, the Court having heard evidence and arguments makes the following findings of fact

(1) The Defendant, Wilber Harden Foster, is charged with *Possession with Intent to Sell and/or Deliver Cocaine; Resist, Obstruct and Delay an Officer; Felony Possession of Marijuana; Possession with Intent to Sell and/or Deliver Marijuana; Possession of Cocaine; Maintaining a Dwelling for Use, Keeping or Selling of a Controlled Substance; Possession of Non-tax Paid Whiskey; and Level 1 Trafficking in Cocaine* in the above numbered cases;

(2) That on January 9, 1998 the Court heard testimony from John T. Cobb, presently a Deputy with the Alamance County Sheriff's Department, and formerly an Investigator with the Alamance County Sheriff's Department Vice/Narcotics Unit, and that Cobb is an experienced officer with respect to vice and narcotics investigations;

(3) That on March 22, 1997 at 8 p.m., officers of the Haw River Police Department and then-Investigator Cobb executed a search warrant at the residence of Michael Grey Jeffrey, 918 E. Main Street, Haw River, NC; during the search, officers located six hundred forty-two (642) grams of marijuana, nine-tenths (.9) gram of cocaine, and a number of weapons, including a fully automatic MAC-10 machine pistol with a noise suppresser;

(4) That on March 22, 1997, after being informed of his Miranda Rights, Jeffrey told Cobb that he had purchased the cocaine and marijuana at 12:30 p.m. on March 22, 1997 from the Defendant, known to Jeffrey as Harden Wilber Foster, Jr., and that Jeffrey could show Cobb the location of Foster's residence;

(5) That on March 22, 1997, Cobb had prior knowledge from confidential sources that Foster had been involved in selling illegal controlled substances over the past year, and that Cobb knew the residence of Foster to be 1523 Hanford Road in Graham, NC;

(6) That on March 24, 1997 at 12:38 p.m. Cobb properly filed an ***Application for Search Warrant*** with Magistrate Sue Hill, which contained the facts from the above paragraphs (2) through (5) in a sworn ***Affidavit*** from Cobb; Hill consequently issued a ***Search***

Warrant for the residence of Harden Wilber Foster, 1523 Hanford Road, Graham, NC;

(7) That on March 24, 1997 at 3:20 p.m. Cobb and other officers of the Alamance County Sheriff's Department executed the ***Search Warrant*** at the Defendant's residence at 1523 Hanford Road; Cobb approached the door of the residence, where the door was open and the screen door closed.

(8) On approaching the door, Cobb announced "Sheriff's Department, Search Warrant" in a loud voice, at which time the door to the residence slammed shut; upon finding the door to be locked, the officers broke the door open and entered the residence.

(9) The Defendant was found on the bathroom floor, flushing the toilet, and struggled with the officers as they tried to stop him. The Defendant was subdued and handcuffed, and after conducting a pat down search of the Defendant which found no weapons or contraband, officers took him to the front yard and sat him in a chair. Cobb then served a copy of the ***Search Warrant*** on the Defendant and read the ***Search Warrant*** to the Defendant; and

(10) The officers then conducted a search of the premises and of vehicles located at the premises and belonging to the defendant, and subsequently seized a number of items of contraband and evidence, including fifty-one point eight (51.8) grams of cocaine and seven (7) pounds of marijuana, these items were listed on the ***Inventory of Seized Property***, Cobb left a copy either with the defendant or in the residence.

THE COURT HAVING HEARD the testimony of Investigator Cobb, and having examined the ***Search Warrant*** in question, makes the following ***Conclusions of Law:***

(1) That the admission by Jeffrey that he owned the illegal controlled substances found at his residence on March 22, 1997, and the admission that Jeffrey had purchased the illegal controlled substances from the Defendant were statements against Jeffrey's penal interest, and carry sufficient indicia of trustworthiness so a to support probable cause for the search warrant;

(2) That the facts alleged by the affidavit sufficiently identify the residence of the Defendant as the place where the drugs would be found;

(3) That the facts alleged by the affidavit were timely, and not stale;

(4) That the totality of the circumstances factually alleged by the affidavit in the ***Application for Search Warrant*** sufficiently establish probable cause for the issuance of the ***Search Warrant;***

(5) That the officers of the Alamance County Sheriff's Department complied with the requirements of N.C.G.S. 15A-249, 251, 252, 255 and 256 in the service and execution of the ***Search Warrant;*** and

(6) That the exclusion of the evidence gained pursuant to the S***earch Warrant*** is not required by the Constitution of the United States, the Constitution of the United States, the Constitution of the State of North Carolina, or by Chapter 15A. Article 11 of the North Carolina General Statues.

BASED UPON THE EVIDENCE HEARD and the foregoing ***Conclusions of Law*** Court hereby **ORDERS** that the Defendant's ***Motion to Suppress*** is **DENIED.**

This, the 9th day of January, 1998.

/s/ J.B. Allen
Chief Resident Superior Court, Judge, presiding

STATE OF NORTH CAROLINA
ALAMANCE COUNTY

File No. 97CRS7485-7491-9883

In The General Court of Justice
☒ Superior Court Division

STATE VERSUS
Name of Defendant: WILBER HARDEN FOSTER
DOB: May 31, 1952
Age: 45
Highest Level of
Education Completed: 15 Years

TRANSCRIPT OF PLEA

The defendant, having offered a plea of **GUILTY** and being first duly sworn, makes the following answers to the questions set out below:

1. Are you able to hear and understand me?

   (1) Yes

2. Do you understand that you have the right to remain silent and that any statement you make may be used against you?

   (2) Yes

3. At what grade level can you read and write?

   (3) College

4.

   (a) Are you now under the influence of alcohol, drugs, narcotics, medicines, pills, or any other Intoxicants?

   (4a) No

   (b) When was the last time you used or consumed any such substance?

   (4b) 1-26-98

5. Have the charges been explained to you by your lawyer, and do you understand the nature of the charges, and do you understand every element of each charge?

(5) Yes

6.

(a) Have you and your lawyer discussed the possible defenses, if any, to the charges?

(6a) Yes

(b) Are you satisfied with you lawyer's legal services?

(6b) Yes

7.

(a) Do you understand that you have the right to plead not guilty and be tried by a jury?

(7a) Yes

(b) Do you understand that at such trial you have the right to confront and to cross examine witnesses against you?

(7b) Yes

(c) Do you understand that by your plea(s) you give up these and your other constitutional rights relating to a trial by jury?

(7c) Yes

10. Do you understand that you are pleading (guilty) to the charges shown on the attached sheet, which carry the total punishments listed.

(10) Yes

11. Do you now personally plead (guilty)?

(11) Yes

12. (a) (*if application)* Are you in fact guilty?

(12a) Yes

13. Have you agreed to plead as part of a plea arrangement? Before you answer, I advise you that the Courts have approved plea negotiating, and if there is such, you may advise me truthfully without fear of incurring my disapproval?

(13) Yes

14. (*if applicable)* The prosecutor and your lawyer have informed the Court that these are all the terms and conditions of your plea: (*See attachment plea arrangements, including voluntary dismissals.)*

Defendant Will Receive The Mandatory Minimum Sentence for Trafficking In Cocaine Of 35 Month Minimum, 42 Months Maximum Other Charges Are Dismissed. Defendant Retains Right To Appeal Denial Of Motion To Suppress And Receive The Relief Of A New Trial And/Or Any Such Other Relief As May Be Granted By The Appellate Courts

(a) Is this correct as being your full plea arrangement?

(14a)Yes

(b) Do you now personally accept this arrangement?

(14b)Yes

15. (Other than the plea arrangement between you and the prosecutor) has anyone made any promises or threatened you in any way to cause you to enter this plea against your wishes?

(15) No

16. Do you enter this plea of your own free will, fully understanding what you are doing?

(16) Yes

17. Do you have any questions about what has just been said to you or about anything else connected with your case?

(17) No

I have read or have heard all of these questions and understand them. The answers shown are the ones I gave in open court and they are true and accurate. Neither my lawyer nor anyone else has told me to give false answers in order to have the Court accept my plea in this case. The conditions of the plea as stated above, if any, are accurate.

SWORN AND SUBSCRIBED TO BEFORE ME

Date 1-27-98 /s/ Isabel G. Chalme
Date 1-27-98 /s/Wilber H. Foster

CERTIFICATION BY LAWYER FOR DEFENDANT

As lawyer for the defendant named above, I hereby certify that the conditions stated above, if any, upon which the defendant's plea was entered are correct and they are agreed to by the defendant and myself. I further certify that I have fully explained to the defendant the nature and elements of the charge(s) to which the defendant is pleading.

Date 1/27/97 /s/ James F. Walker /s/ James F. Walker

CERTIFICATION BY PROSECUTOR

As prosecutor for this Prosecutorial District, I hereby certify that the conditions stated above, if any, are the terms agreed to by the defendant and his/her lawyer and myself for the entry of the plea by the defendant to the charge(s) in this case.

Date 1-27-98 /s/A. Bass /s/ A. Bass

PLEA ADJUDICATION

Upon consideration of the record proper, evidence presented, answers of defendant, and statements of the lawyer for the defendant and the District Attorney, the undersigned finds:

1. That there is factual basis for the entry of the plea.
2. That the defendant is satisfied with his/her lawyer.
3. That the defendant is competent to stand trial and that the plea is the informed choice of the defendant and is made freely, voluntarily and understandingly.

The defendant's plea is hereby accepted by the Court and is ordered recorded.

Date 1-27-98 /s/ Henry W. Hight

No. COA 98-642 DISTRICT FIFTEEN-A

NORTH CAROLINA COURT OF APPEALS

****

STATE OF NORTH CAROLINA)
)
vs.)
)
WILBER HARDEN FOSTER)
Defendant)

****

MOTION FOR APPROPRIATE RELIEF

****

From Alamance County
No. 97CRS 7485 through 7491;
And 97 CRS 9883
FILED: JULY 9, 1998
ENTERED: JULY 9, 1998

TABLE OF CASES AND AUTHORITIES

Cases:

Department of Revenue v. Kurth Ranch,
511 U.S. 767 (1994) 2, 3, 4
Lynn v. West, 134 F.3d 582 (4th Cir. 1998).....3, 4
United States v. Halper, 490 U.S. 435, 440 (1989) ...3, 4

Constitutional Provisions:

5th Amendment, U.S. Constitution.....4, 5
14th Amendment, U.S. Constitution.....5
Art. I, sec. 17, N.C. Constitution 4, 5

Statutes:

N.C.G.S. 15A-1411 1
N.C.G.S. 15A-1415 1
N.C.G.S. 15A-1418 1

No. COA 98-642 DISTRICT FIFTEEN-A

NORTH CAROLINA COURT OF APPEALS

****

STATE OF NORTH CAROLINA)
)
vs.)
)
WILBER HARDEN FOSTER)
Defendant)

****

From Alamance County
No 97 CRS 7485 through 7491;
And 97 CRS 9883

MOTION FOR APPROPRIATE RELIEF

****

TO THE NORTH CAROLINA COURT OF APPEALS:

NOW COMES, the Defendant in the above captioned criminal case, who through his attorney and pursuant to N.C.G.S. 15A-1411 and 15A-1418, makes a motion for appropriate relief under N.C.G.S 15A-1415:

STATEMENT OF THE CASE

On March 24, 1997, the Alamance County Sheriff's Department executed a search warrant in the home of the Defendant, Wilber Harden Foster. Following the search, the officers seized a quantity of cocaine alleged to be 76.6 grams and a quantity of marijuana alleged to be approximately 4589.4 grams. The Defendant was subsequently charged with the offenses of Possession of Cocaine with intent to sell and/or deliver a controlled substance, resist and/or obstruct and/or delay a public officer, possession of marijuana,

maintaining a dwelling for keeping and/or selling a controlled substance, possession of an alcoholic beverage upon which taxes have not been paid, possession of drug paraphernalia and trafficking in cocaine.

As a result of the alleged possession of these controlled substances, one day following the date of offense, the North Carolina Department of Revenue issued a Notice of Controlled Substance Tax Assessment against Wilber Harden Foster that assessed "tax" on the seized controlled substances in the amount of $31,465.00. a "pentalty" in the amount of $15,732.50 and "interest" in the amount of $235.99 for a total of $47,433.49. App. A-2. (Certified copies of the documents relating to the assessment of the Controlled Substance Tax and the sale of property to satisfy this tax are attached hereto as an Appendix and numbered as A-1 through A-10). A Certificate of Tax Liability certifying that Wilber Harden Foster was indebted to the State of North Carolina for these amounts was entered on the same day, March 25, 1997, and was filed in Alamance County on April 4, 1997. App A-5. On that same date, March 25, 1997, a Warrant for Collection of Taxes was issued commanding that any property owned by Wilber Harden Foster be levied upon and sold to satisfy the tax assessment. App. A-6, 7. Thereafter, on June 14, 1997, the Department of Revenue conducted a sale of the Defendant's property to satisfy a portion of this tax. A "Noblia" mens watch, a mens diamond ring with a 1.14 carat diamond and a mens coin ring, dated 1881, all of which property was owned by the Defendant, was sold and the funds were delivered to the North Carolina Department of Revenue. App. A-9.

ALLEGATION OF GROUNDS

In Department of Revenue v. Kurth Ranch, 511 U.S. 767 (1994), the United States Supreme Court considered the issue of whether a similar Montana drug tax was punitive. In Kurth Ranch, Montana law enforcement officers raided the

farm of the Kurth's, seized marijuana plants and placed them under arrest and charged them in a state court proceeding with drug charges. Id. At 767. After the Kurths pleaded guilty to drug charges, the Montana Department of Revenue attempted, in a separate proceeding, to collect a state tax imposed on the possession of dangerous drugs. Id. The Court held that, "Taken as a whole, this drug tax is a concoction of amomalies, too far-removed in crucial respects from a standard tax assessment to escape characterization as punishment for the purpose of double jeopardy analysis." Id. At 783. The Court then barred the enforcement of the Montana Drug Tax following a criminal proceeding, holding that, "it is a second punishment within the contemplation of a constitutional protection that has 'deep roots in our history and jurisprudence', and therefore must be imposed during the first prosecution or not at all." Id. At 784 (quoting United States v. Halper, 490 U.S. 435, 440 (1989)).

In Lynn v. West, 134 F.3d 582 (4th Cir. 1998), the United States Court of Appeals for the Fourth Circuit addressed the issue of whether the North Carolina Controlled Substance Tax (Drug Tax), N.C.G.S. 105-113.105 et seq is a criminal penalty. As in the case sub judice, the Department of Revenue asserted that Defendant Lynn owed a tax of $200 per gram on the 970 grams of cocaine taken from his house. Lynn at 584. The Court held that "the Drug Tax is in reality a criminal penalty under Department of Revenue v. Kurth Ranch, 511 U.S. 767 (1994)." Id.

In the case sub judice, unlike Kurth Ranch, the criminal punishment imposed by the Drug Tax occurred prior to the punishment for the criminal proceeding. As a result, it is the subsequent criminal punishment under the State criminal proceedings that is in violation of the Double Jeopardy Clause of the United States Constitution. In Lynn, like the present case, the punishment under the criminal charges was imposed subsequent to the imposition of the Drug Tax. The Court held that the Double Jeopardy clause did not apply only because the subsequent prosecution was

brought by the United States rather than the State of North Carolina. Lynn, 134F.3d 582, 593. Since the criminal prosecution in the present case was brought by the State of North Carolina, the subsequent indictment and punishment for the criminal offenses by the State of North Carolina after the imposition of the Drug Tax by the State of North Carolina violates the Double Jeopardy Clause. The fact that the prior punishment was a "tax" assessment is of no consequence. The United States Government argued in United States v. Halper 490 U.S. 435 (1989) that the constitution prohibition against multiple punishments, "applied only to punishments meted out in a criminal proceeding." Kurth Ranch, 511 U.S. 767, 802 (Justice Scalia dissenting, citing Brief for United States in United States v. Halper, O.T. 1988, No. 87-1383, pp. 11-12, 21-24.) Even Justice Scalia in his dissent in Kurth Ranch held that, "[I] found, and continue to find, that distinction incoherent. If the Constitution prohibits multiple punishments, the nature of the proceeding in which punishment is imposed should make no difference." Kurth Ranch, 511 U.S. 767, 802.

Accordingly, the imposition of the criminal punishment against Defendant Wilber Harden Foster in 97 CRS 7485 through 97 CRS 7491 and 97 CRS 9883 violates the Double Jeopardy Clause of the 5th Amendment of the United States Constitution, the "law of the land" clause of Article I, Section 17 of the North Carolina Constitution and the Due Process Clause of the 14th Amendment of the United States Constitution.

WHEREFORE, the Defendant, by and through counsel respectfully moves the Court for the following relief:

1. That the Court vacate the judgment against the Defendant in 97 CRS 7485 through 97 CRS 7491 and 97 CRS 9883 and enter an order dismissing the charges in 97 CRS 7485 through 97 CRS 7491 and 97 CRS 9883 on the grounds that punishment for these charges following the imposition of the North

Carolina Controlled Substance Tax violates the Double Jeopardy Clause and criminal-procedure guarantees of the Fifth Amendment of the United States Constitution, the North Carolina Constitution, including, but not limited to, the 'law of the land" clause of Article I, Section 17 of the North Carolina Constitution, and the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

2. That the Court grant to the Defendant such other and further relief as may be deemed just and proper.

This the 7th day of July, 1998.

WALKER & BULLARD
By /s/ James F. Walker
Daniel S. Bullard
Attorneys for Defendant/Appellant
Post Office Box 223
Gibsonville, North Carolina 27249
(336) 449-4909

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Motion for Appropriate Relief was this day served upon the attorney for the State in the above case by enclosing the same in an envelope addressed to such attorney at his business address as disclosed by correspondence received from opposing counsel requesting service upon him, addressed as follows, John J. Aldridge, III, Assistant Attorney General, North Carolina Department of Justice, Post Office Box 629, Raleigh, North Carolina 27602-0629, with postage fully prepaid and by depositing said envelope in a U.S. Post Office mail box in Gibsonville, North Carolina, on the 7th day of July, 1998.

/s/Daniel S. Bullard
Attorney for Defendant/Appellant

SERVICE ON:

Mr. John J. Aldridge, III
Assistant Attorney General
North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629

NORTH CAROLINA DEPARTMENT OF REVENUE

James B. Hunt, Jr.
Governor

Muriel K. Offerman
Secretary

June 11, 1998

STATE OF NORTH CAROLINA)
)
COUNTY OF WAKE)

CERTIFICATE

I, Richard W. Riddle, hereby certify that I am the Director of the Unauthorized Substance Tax Division of the North Carolina Department of Revenue, and in this capacity have custody of the records of unauthorized substance tax taxpayers' assessments.

I further certify that the attached are true and exact copies of the Assessment and all related papers issued against Wilber Harden Foster.

WITNESS my hand and official seal of the State of North Carolina Department of Revenue this 11th day of June, 1998.

/s/Richard W. Riddle, Director
Unauthorized Substance Tax
Division, North Carolina
Department of Revenue

P.O. BOX 25000, Raleigh, North Carolina 27640
State Courier 51-71-00
An Equal Opportunity Employer

State of North Carolina
DEPARTMENT OF REVENUE
P.O. Box 25000
Raleigh, NC 27640

Form BD-10
027736
AN: 403109

IMPORTANT
Action Must Be Taken
IMMEDIATELY

NOTICE OF CONTROLLED SUBSTANCE TAX ASSESSMENT

Wilber Harden Foster
1523 Hanford Rd.
Graham, NC 27253

March 25, 1997
242-84-1088
Alamance

YOU ARE HEREBY NOTIFIED that an assessment of controlled substance tax plus interest and any applicable penalty is proposed against you as follows:

TAX $31,465.00
PENALTY $15,732.50
INTEREST* $235.99
TOTAL $47,433.49

Substances included in this tax assessment are:

	Taxable Quantity	Tax Rate	Tax Amount
76.60 grams Cocaine	77.00	200.00	15,400.00
4589.40 grams Marijuana	4,590.00	3.50	16,065.00

*** INTEREST ACCRUES ON ALL UNPAID TAXES FROM MARCH 24, 1997 TO THE DATE OF PAYMENT.**

This assessment is proposed pursuant to G.S. 105-113.111 (See attached copy). If you desire a hearing before the Secretary of Revenue with respect to this proposed assessment, you must submit a written request for hearing within thirty days after the date of this notice, as provided by G.S. 105-241.1. Your request should set forth in detail your objection to the assessment and must be timely served upon the Secretary of Revenue addressed to Controlled Substance Tax Division. Unless your application for hearing is filed within the time stated, this proposed assessment will become final and conclusive without further notice.

In the event you fail to respond immediately to this proposed assessment by remitting the full amount shown due or by posting a bond, collection may proceed pursuant to G.S. 105-241.1(g) or G.S. 105-242 without regard to whether you have requested a hearing.

/s/ Muriel K. Offerman
SECRETARY OF REVENUE
By: D.A. KECK
ENFORCEMENT OFFICER

To insure proper credit, please
attach your payment to the copy
of this notice.

NORTH CAROLINA DEPARTMENT OF REVENUE

James B. Hunt, Jr.
Governor

Muriel K. Offerman
Secretary

March 25, 1997

Wilber Harden Foster
1523 Hanford Rd.
Graham, NC 27253

RE: CONTROLLED SUBSTANCE TAX ASSESSMENT
AN: 403109

Dear Wilber Harden Foster;

A Notice of Controlled Substance Tax Assessment issued by the North Carolina Department of Revenue is enclosed. This assessment is based on information contained in the Report of Arrest and/or Seizure Involving Non-tax-paid (Unstamped) Controlled Substance and Counterfeit Controlled Substances which is attached. That document, Form BD-4, constitutes the "written statement, or transcript, of the information and the evidence upon which the proposed assessment is based" as provided in G.S. 105-241.1(c). In addition, I attach for your convenience a copy of the applicable Controlled Substance Tax Law.

Concurrent with this action, we are docketing with the Clerk of Court of the appropriate county a Certificate of Tax Liability which places a lien on all your real property and which subjects your personal property to levy. A copy of the Certificate is attached for your review.

I urge you to act at once to resolve this matter.

/s/ Muriel K. Offerman
SECRETARY OF REVENUE

By: D.A. KECK
ENFORCEMENT OFFICER
N.C. Dept of Revenue-Sanford
P.O. BOX 970
Sanford NC

P.O. Box 25000, Raleigh, North Carolina 27640
An Equal Opportunity/Affirmative Action Employer

☒ Original report

Form BD-4
(12/89)

STATE BUREAU OF INVESTIGATION
ADMINISTRATIVE SERVICES
3320 OLD GARNER ROAD
RALEIGH; NORTH CAROLINA 27610-5698

REPORT OF ARREST AND/OR SEIZURE INVOLVING NONTAXPAID (UNSTAMPED) CONTROLLED SUBSTANCES AND COUTERFEIT CONTROLLED SUBSTANCES
(Complete in quadruplicate)

Before completing, review the instructions and information on the reverse. Information required by this report is to be typed or printed in ink.

(1) Reporting agency:
Name: Alamance Co Sheriff's Dept
Street address: 109 South Maple Street
City: Graham
County: alamance
State: N.C.
Name of arresting officer: Investigator J.T. Cobb
Telephone number: (910) 570-6344
Report date: 03-24-97

(2) Identification of the individual arrested in possession of the substance(s):
Name: Wilber Harden Foster
Social Security Number: 242-84-1088
Street Address: 1523 Hanford Road
City: Graham
State: N.C.
Zip Code: 27253
Driver's license number/State: 5951955 N.C.
Date of birth: 05-31-52

(3) Time and place of arrest or seizure:
Date: 03-24-97
Time: 1520 hrs
Street address or specific location: 1523 Hanford Road
City: Graham
County: Alamance

(4) Amount of nontaxpaid (unstamped) controlled substance and/or counterfeit controlled substance, by type, possessed and/or seized (See Instruction No. 4 on reverse):
Marijuana.....4589.4 grams
.Other controlled substance (by weight)-
cocaine.....76.6 grams

DOR 40

State of North Carolina
DEPARTMENT OF REVENUE
P.O. BOX 25000
Raleigh, N.C. 27640

Muriel K. Offerman, Secretary
State of North Carolina
On the Relation of the
SECRETARY OF REVENUE

-vs-

Wilber Harden Foster
1523 Hanford Rd.
Graham, NC 27253

CERTIFICATE OF TAX LIABILITY
ID: 242-84-1088
AN: 403109

To The Clerk Of The Superior Court Of
Alamance County, North Carolina:

I, Muriel K. Offerman, Secretary of Revenue of the State of North Carolina, under and by virtue of its revenue laws, do hereby certify that Wilber Harden Foster is indebted to the State of North Carolina on account of duly assessed and delinquent taxes, penalties and interest, the essential particulars of which, including the nature and amount of the tax and the date when the same was due and payable, are as follows:

POSSESSION DATE:	March 24, 1997
TAX	$31,465.00
PENALTY	$15,732.50
INTEREST*	$235.99

LESS PAID	$0.00
TOTAL	$47,433.49

Per Notice of Controlled Substance Tax Assessment
March 24, 1997

*** INTEREST ACCRUES ON ALL UNPAID TAXES FROM MARCH 24, 1997 TO THE DATE OF PAYMENT.**

You, therefore, are hereby directed and required to docket and cross-index this certificate in your records as a judgment against said tax debtor, pursuant to the provisions of G.S. 105-242; and thereupon it shall take effect, be enforceable, and bear interest from the date hereof, the same as any other duly docketed and indexed judgment of your court.

Witness my hand and official seal, this the 25th day of March, 1997.

/s/ Muriel K. Offerman
Secretary of Revenue

By:/s/
Enforcement Officer

STATE OF NORTH CAROLINA
DEPARTMENT OF REVENUE
P.O. BOX 25000
RALEIGH, N.C. 27640

JANICE H. FAULKNER, SECRETARY

IN THE MATTER OF
Wilber Harden Foster
1527 Hanford Rd.
Graham, NC

v.

STATE OF NORTH CAROLINA

WARRANT FOR COLLECTION OF TAXES

To any Revenue or Enforcement Officer of the North Carolina Department of Revenue

WHEREAS, Wilber H. Foster is indebted to the State of North Carolina on account of duly assessed taxes, interest and penalties as follows:

DATE	3/25/97
TAX	$16065.00
	15400.00
	31465.00
PENALTY	$8032.50
	7700.00
	15732.50
INTEREST	$120.49
	115.50
	235.99
LESS PAID	0.00

TOTAL $24217.99
23215.50
47433.47

AND WHEREAS, said taxes are now delinquent and unpaid;

NOW, THEREFORE, pursuant to G.S. 105-24(a)(2), you are hereby ordered and commanded to levy upon and sell the personal property of said taxpayer found within the State of North Carolina, or so much thereof as may be necessary to pay and satisfy said indebtedness and your costs hereof, and to return to the undersigned the monies collected hereunder within ninety days from the date of receipt of this order.

WITNESS my hand and official seal, this the 25 day of May 1997.

/s/Janice H. Faulker
Secretary of Revenue
By/s/ Deputy

NO HOMESTEAD OR PERSONAL PROPERTY EXEMPTION IS ALLOWED AS AGAINST TAXES. (SEE N.C. CONSTITUTION, ARTICLE X, SEC. 2; CARSTARPHEN VS. PLYMOUTH, 186 N.C. 98.)

G.S. 105-113.111 is in party as follows:

"If the dealer does not pay the tax, penalty, and interest immediately upon receipt of the notice and demand, the Secretary shall collect the tax, penalty, and interest pursuant to the procedure set forth in G.S. 105-242..."

G.S. 105-242(a)(2) is in part as follows:

"The Secretary may issue a warrant or order under the Secretary's hand and seal to any revenue officer or other employee of the Department of Revenue charged with the duty to collect taxes, commanding the officer or employee to levy upon and sell the taxpayer's personal property.... found within the State for the payment of the tax, including penalties and interest."

RETURN OF REVENUE OFFICER

RECEIVED THE 25 DAY OF MAY, 1997.
DEMAND AND LEVY MADE THE 25 DAY OF MAY 1997.
AND I RETURN $2466.00
(1) Noblia Watch (mens) (gold n-color)
(1) Mens Diamond Ring w/1.14 carat diamond (gold n-color)
(1) Mens Coin Ring, dated 1881

/s/ REVENUE OFFICER

IMPORTANT
Action Must Be Taken
IMMEDIATELY

FORM BD-10B

AN: 403109

State of North Carolina
DEPARTMENT OF REVENUE
P.O. BOX 25000
Raleigh, N.C. 27640

FINAL NOTICE OF TAX ASSESSMENT
CONTROLLED SUBSTANCE

WILBER HARDEN FOSTER
1523 HANFORD RD
GRAHAM, NC 27253

County: Alamance
Date Billed: May 12, 1997
242-84-1088

YOU ARE HEREBY NOTIFIED that the assessment against you has become final and immediately due and collectible. Our record indicate that your payment has not been received. THIS NOTICE CONSTITUTES DEMAND FOR PAYMENT. If not paid immediately, your account will be assigned for collection. Please send you payment along with the bottom portion of this notice. The Department's collection procedures and your rights are included with this notice.

If you have paid the assessment, please disregard this notice. This billing does not reflect payments made prior to the billing date. Please deduct previous payments from the Balance Due amount before submitting payment to our office.

POSSESSION DATE:	March 24, 1997
TAX	$31,465.00
PENALTY	$15,732.50
INTEREST	$385.45
TOTAL	$47,582.95
LESS PAYMENT	$0.00

BALANCE DUE $47,582.95

PAY THIS AMOUNT: $47,582.95

DETACH HERE AND RETURN LOWER PORTION WITH YOUR PAYMENT TO THE ADDRESS SHOWN BELOW.

To insure proper credit, please attach your payment to this bottom portion of the notice.

Form BD-10B

State of North Carolina
DEPARTMENT OF REVENUE
P.O. BOX 25000 Raleigh, N.C. 27640

AN: 403109
Date Billed: May 12, 1997

FINAL NOTICE OF TAX ASSESSMENT – CONTROLLED SUBSTANCE

POSSESSION DATE: March 24, 1997 County: Alamance

TAX	$31,465.00
PENALTY	$15,732.50
INTEREST	$385.45
TOTAL	$47,582.95
LESS PAYMENT	$0.00
BALANCE DUE	$47,582.95

WILBER HARDEN FOSTER SSN: 242-84-1088
1523 HANFORD RD
GRAHAM NC 27253

ENTER AMOUNT OF PAYMENT
Make check payable to
NC DEPARTMENT OF REVENUE

NORTH CAROLINA
WAKE COUNTY

STATE OF NORTH CAROLINA)
DEPARTMENT OF REVENUE)
)
v.)
)

WILBER HARDEN FOSTER
1523 HANFORD RD.
GRAHAM, NC 27253

NOTICE OF SALE OF PERSONAL PROPERTY

Under and by virtue of a tax warrant issued on file AN#~~403127~~ 403109, by the Secretary of Revenue for the State of North Carolina directed to any enforcement officer for the North Carolina Department of Revenue, in the above entitled action, the undersigned will on the 14TH DAY OF JUNE, 1997 at 10:00 a.m. offer for sale to the highest bidder for cash, to satisfy said tax warrant, all rights, title and interest which the defendant now has or at any time at or after the execution of the tax warrant may have had in the following described property.

1-NOBLIA WATCH (MENS) (GOLD N-COLOR)
1-MENS DIAMOND RING W/1.14 CARAT DIAMOND (GOLD N-COLOR)
1-MENS COIN RING, DATED 1881

This property will be sold at the above mentioned time and date at JIM GRAHAM BLDG, STATE FAIRGROUNDS, RALEIGH, NORTH CAROLINA.

This sale is subject to any outstanding liens.
SECRETARY OF REVENUE
by: /s/ D.W.KECK, ENFORCEMENT OFFICER

Form A/C 1127
(Rev. 3-95)

2972700039799
APR 02 1997

NORTH CAROLINA DEPARTMENT OF REVENUE
SPECIAL COLLECTION REPORT

(FOR USE WHERE NO TAX REPORT, RETURN APPLICATION, ETC. IS AVAILABLE)

DATE 3/25/97 TAX TYPE SC BO
A/N 403109

NAME OF TAXPAYER WILBER FOSTER
Street Hanford Rd
City Graham
County Alamance

DESCRIPTION OF REMITTANCE

Form of Remittance Money Order
Date 3/25/97
Number 1235
Bank or Post Office on Which Drawn: SECU
Revenue Officer's Name DWLECU
Receipt Number 1407034

Amount of Remittance $2466.00

Remarks:
ppltms

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

STATE OF NORTH CAROLINA
ALAMANCE COUNTY

STATE OF NORTH CAROLINA	)
	)
v.	)
	)
WILBER HARDEN FOSTER	)
Defendant	)

97 CRS 7485-7490; 9883
FILED: MAY 13, 1997
ENTERED: MAY 13, 1997

MOTION TO SUPPRESS

Defendant moves pursuant to N.C.G.S. 15A-974 and N.C.G.S. 15A, Article 11, to suppress the following evidence:

All items recovered in the search of the Defendant's residence on March 24, 1997.

The grounds for the suppression of this evidence are that:

(A) Its exclusion is required by the Constitution of the United States and/or the Constitution of North Carolina and Chapter 15A of the General Statutes in that it was obtained pursuant to an invalid search warrant that was not supported by an affidavit establishing probable cause to believe that the items subject to seizure would be found in or upon the

premises, vehicle or person named in the search warrant.

B) It was obtained as a result of substantial violation of the provisions of Chapter 15A of the General Statutes, in that the individuals executed the warrant in violation of N.C.G.S. 15A-249, 251, 252, 255 and 256.

WHEREFORE, defendant prays that the Court:

1. Issue an order summarily suppressing the above-described evidence pursuant to N.C.G.S. 15A-977(b), or

Notice is hereby given that defendant reserves the right to appeal if this motion is denied and there is a subsequent plea of guilty.

This the 30th day of April, 1997.

/s/JAMES F. WALKER
Attorney for Defendant

STATE OF NORTH CAROLINA
ALAMANCE COUNTY
IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION

SEARCH WARRANT

In the Matter of:	HARDEN WILBER FOSTER 1523 HANFORD RD. GRAHAM
Date Issued:	March 24, 1997
Time Issued:	12:38 p.m.
Name of Applicant:	J.T. Cobb

RETURN OF SERVICE

I certify that this Search WARRANT was received and executed as follows:

Date Issued:	March 24, 1997
Time Issued:	12:38 p.m.
Date Executed:	March 24, 1997
Date/Time of Return:	March 24,1 997 @ 6:37 p.m.

☒ I seized the items listed on the attached inventory

Signature of Officer Making Return
/s/ J.T.Cobb
Signature of Agency of Officer
/s/ Alamance County Sheriff

To any officer with authority and jurisdiction to conduct the search authorized by this Search Warrant:

I, the undersigned, find that there is probable cause to believe that the property and person described in the application on the reverse side and related to the commission of a crime is located as describe the application.

You are commanded to search the premises, vehicle, person, and other place or item described in the application for the property and person in question. If the property

and/or person are found, make the seizure and keep the property subject to Court Order and process the person according to law.

You are directed to execute this Search Warrant within forty-eight (48) hours from the time indicated on this Warrant and make due return to the Clerk of the Issuing Court.

This Search Warrant is issued upon information furnished under oath by the person or persons shown.

Date: March 24, 1997
/s/ Sue B. Hill
☒ Magistrate

This Search Warrant was returned to me on the date and time shown below
Date: March 24, 1997 Time: 6:37 p.m.
/s/ Sue B. Hill, Magistrate

APPLICATION FOR SEARCH WARRANT

I, JOHN T. COBB OF THE ALAMANCE COUNTY SHERIFF'S DEPT.
being duly sworn, request that the court issue a warrant to search the person, place, vehicle, and other items described in this application and to find and seize the property and person described in this application. There is probable cause to believe that **SEE ATTACHED**

Constitutes evidence of a crime and the identity of a crime and the identity of a person participating in a crime **IN VIOLATION OF THE N.C. CONTROLLED SUBSTANCE ACT.** and is located

☒in the following premises **1523 HANFORD RD. GRAHAM**
☒ on the following person(s) **SEE ATTACHED**
☒ in the following vehicle(s) **SEE ATTACHED**
☒ **ANY OUT BUILDINGS**

The applicant swears to the following facts to establish probable cause for the issuance of a search warrant: **SEE ATTACHED**

SWORN AND SUBSCRIBED TO BEFORE ME
Date: March 24, 1997
Signature: /s/Sue B. Hill
☒ Magistrate

Signature of Applicant: /s/John T. Cobb

ATTACHMENT

(Continuation of application of search warrant)

I, Investigator TIM COBB of the City/County Vice and Narcotics Unit, a division of the Alamance County Sheriff's Department have been a sworn Law Enforcement Officer for over 7 years. During my time as a Law Enforcement Officer I have been involved in investigations relating to violations of the North Carolina statutes governing controlled substances. I am now assigned as an INVESTIGATOR for the vice narcotics unit of the Sheriffs department and have conducted numerous drug investigations. Some of these investigations have not only resulted in the arrest of persons but also convictions of persons for drug violations. Therefore I have experienced relating to the practices of persons involved in violations to those involved in drug violations, I have received training in Basic Law Enforcement, Laws of arrest, search and seizure, drug enforcement for patrol officers, I am also a member of the International Narcotic Enforcement Officers Association, and the North Carolina Narcotic officers Association. Therefore, I have experience relating to the practices of persons involved in violations of the North Carolina Controlled Substances Act, and the laws of the State of North Carolina.

(Description of property to be seized)

Marijuana and any other controlled substance. Also any paraphernalia such as scales, packaging materials, and any containers used to package or store marijuana. Any and all other materials not otherwise listed above which are the fruits instumentalities and/or evidence of violations of the general statutes.

(Description of premises to be searched)

This residence will be a light yellow tan frame house located at 1523 Hanford Rd. Graham N.C. To locate this residence traveling on S. Maple Ave from I-85 go approximately 2 tenths of a mile until you come to the intersection of S. Maple Ave. and Hanford Rd. turn left on Hanford Rd. travel on Hanford Rd. approximately one mile, the residence will be on the left with a wooden mailbox with the numbers 1523 on same, the driveway will be to the left of the residence.

Sworn and subscribed to before me

/s/ Sue B. Hill
Date 3-24-97

/s/ John J. Cahn
Date 3-24-97

ATTACHMENT

(Continuation of application for search warrant)

(Facts to establish probable cause)

On March 22, 1997, at approximately 2000 hours this affiant was contacted by a w/m Michael Grey Jeffrey of 918 E. Main St. Haw River during a search with a search warrant of his residence, during this search I located 642.2 grams of marijuana, .9 grams of cocaine, eight handguns, one fully automatic mac 10 machine gun with suppressor Michael Grey Jeffrey and Karen Overman Jeffrey w/f D.O.B. 02-10-59 were then arrested. A further search of the residence continued. Mr. Jeffrey stated after being advised of his rights under Miranda at the Alamance County Sheriffs department he stated to me the following that he had gotten the marijuana on 03-22-97 at 12:30 p.m. from a white male subject that he knew as "HARDEN WILBER FOSTER JR." Mr. Fosters residence is located at 1523 Hanford Rd. Graham N.C. a location on the south side of Alamance County. Mr. Jeffrey stated that he could show me this residence where the marijuana had came from. Mr. Jeffrey also stated that he would be willing to testify against Mr. FOSTER in a court of law. Also in the last twelve months our division, along with Burlington P.D., confidential informants, and confidential sources has received information on Mr. Harden drug activity at his residence. This information was given by Michael Grey Jeffrey in hopes for assistance in the future and based on his declaration of penal interest.

Based on the totality of circumstances stated above from both a confidential source an also the Information from Michael Grey Jeffrey and the marijuana located this affiant believes there is probable cause to believe that the seized marijuana came from the above described location.

Sworn and subscribed to before me

/s/ Sue R. Hill
Date 3-24-97

/s/ J. T. Cobb
Signature of Applicant
Date 3-24-97

ATTACHMENT

(Continued of application for search warrant)

The above information has been determined to be true and accurate and reliable. Based on these facts and this information, I request the court to issue a search warrant for the above described residence.

Sworn and subscribed to before me

/s/ John T. Cobb
Date 3-24-97

STATE OF NORTH CAROLINA File No. 97-7486-91

In the General Court of Justice
ALAMANCE County

INVENTORY OF SEIZED PROPERTY

In the Matter of

Name: WILBUR HARDEN FOSTER
1523 HANFORD RD. GRAHAM
Date: March 24, 1997

I, the undersigned officer, executed a search of:

This search was made pursuant to
☒ a search warrant issued by: **SUE HILL**

The following items were seized:

ITEMS SEIZED FROM THE LIVING ROOM:

1. **SCALES WITH RESIDUE ON SAME**
2. **BROWNING SHOTGUN SERIAL #H6000**
3. **TWO JARS OF GREEN MATTER**
4. **GOLD COLOR WATCH**
5. **GOLD COLOR RING WITH WHITE STONE**
6. **GOLD COLOR RING WITH COIN IN SAME**
7. **ONE YASHICA 35 MM CAMERA WITH FILM IN SAME**
8. **ONE CAR HANDHELD PHONE AND CHARGER**
9. **2,000.00 CASH IN BOOT**
10. **5 PLASTIC CONTAINERS OF WHITE POWDER**
11. **ONE BOX BAKING SODA**

12. **ONE HERSTAL BELGIQUE HANDGUN W/CLIP SERIAL #195566**
13. **ONE NEW ENGLAND ARMS 12 GAUGE SHOTGUN SINGAL SHOT SERIAL #235950**
14. **ONE BROWNING 12 GAUAGE SHOTGUN AUTO. SERIAL #H-16000**
15. **ONE BRETTA 380 AUTO HANDGUN W/CLIP B46398Y**
16. **SEVERAL HOW TO GROW BOOKS ON MARIJUANA**
17. **ASSORTED DRUG PARAPHERNALIA**
18. **SHOTGUN AMO**
19. **Automatic Handgun Amo.**
20. **27 Assorted Smoking Pipes**
21. **6 Glass Pipes Smoking**
22. **27 Boxes Assorted Amo**

ARTICLE 2D.

Schedule B-D. Unauthorized Substances Taxes.

§105-113.105 Purpose.

The purpose of this Article is to levy an excise tax to generate revenue for State and local law enforcement agencies and for the General Fund. Nothing in this Article may in any manner provide immunity from criminal prosecution for a person who possesses an illegal substance. (1989, c. 772, s. 1; 1995, c. 340, s. 1,; 1997-292, s. 1.)

§105-113.106. Definitions.

The following definitions apply in this Article:

(1) Controlled Substance.-Defined in G.S. 90-87.
(2) Repealed by Session Laws 1995, c. 340, s. 1.
(3) Dealer.-Any of the following:

a. A person who actually or constructively possesses more than 42.5 grams of marijuana, seven or more grams of any other controlled substance that is sold by weight, or 10 or more dosage units of any other controlled substance that is not sold by weight.
b. A person who in violation of Chapter 18B of the General Statutes possesses illicit spirituous liquor for sale.
c. A person who in violation of Chapter 18B of the General Statutes possesses an illicit mixed beverage for sale.

(4) Repealed by Session Laws 1995, c. 340, s. 1.

(4a) Illicit mixed beverage.-A mixed beverage, as defined in G.S. 18B-101, composed in whole or in part from spirituous liquor on which the charge imposed by G.S. 18B-804(b)(8) has not been paid, but not including a premixed cocktail served from a closed package containing only one serving.

(4b) Illicit spirituous liquor.-Spirituous liquor, as defined in G.S. 105-113.68, not authorized by the North Carolina Alcoholic Beverage Control Commission. Some examples of illicit spirtuous liquor are the products known as "bootleg liquor","moonshine", "non-tax-paid liquor", and "white liquor".

(4c) Low-street-value drug.-Any of the following controlled substances:

a. An anabolic steriod as defined in G.S. 90-91(k).

b. A depressant described in G.S.90-89(d), 90-90(d),90-91(b), or 90-92(aa).

c. A hallucinogenic substance described in G.S. 90-89(c) or G.S.90-90(e).

d. A stimulant described in G.S. 90-89(e), 90-90(c), 90-91(j), 90-92(d), or 90-93(a)3.

e. A controlled substance described in G.S. 90-91(c), (d), or (e), 90-92(c), (e), or (f), or 90-93(a)1.

(5) Repealed by Session Laws 1995, c. 340, s. 1.

(6) Marijuana.-All parts of the plant of the genus Cannabis, whether growing or not; the seeds of this plant; the resin extracted from any part of this plant; and every compound, salt, derivative, mixture, or preparation of this plant, its seeds, or its resin.

(6a) Mash.-The fermentable starchy mixture from which spirituous liquor can be distilled.

(7) Person.-Defined in G.S. 105-228.90.

(8) Secretary.-Defined in G.S. 105-228.90.

(9) Unauthorized substance.-A controlled substance, an illicit mixed beverage, illicit spirituous liquor, or mash. (1989, c.772, s.1; 1993, c.354, s.10; 1995, c.340, s.1; 1997-292, s.1.)

§105-113.107. Excise tax on unauthorized substances.

(a) Controlled Substances.-An excise tax is levied on controlled substances possessed, either actually or constructively, by dealers at the following rates:

(1) At the rate of forty cents (40¢) for each gram, or fraction thereof, of harvested marijuana stems and stalks that have been separated from and are not mixed with any other parts of the marijuana plant.

(1a) At the rate of three dollars and fifty cents ($3.50) for each gram, or fraction thereof, of marijuana, other than separated stems and stalks taxed under subdivision (1) of this section.

(2) At the rate of two hundred dollars ($200.00) for each gram, or fraction thereof, of any other controlled substance that is sold by weight.

(3) At the rate of four hundred dollars ($400.00) for each 10 dosage units, or fraction thereof, of any other controlled substance that is not sold by weight.

A quantity of marijuana or other controlled substance is measured by the weight of the substance whether pure or impure or dilute, or by dosage units when the substance is not sold by weight, in the dealer's possession. A quantity of a controlled substance is dilute if it consists of a detectable quantity of pure controlled substance and any excipients or fillers.

(b) Illicit Spirituous Liquor.-An excise tax is levied on illicit spirituous liquor possessed by a dealer at the following rates:

(1) At the rate of thirty-one dollars and seventy cents ($31.70) for each gallon, or fraction thereof, of illicit spirituous liquor sold by the drink.

(2) At the rate of twelve dollars and eighty cents ($12.80) for each gallon, or fraction thereof, of illicit spirituous liquor not sold by the drink.

(c) Mash.-An excise tax is levied on mash possessed by a dealer at the rate of one dollar and twenty –eight cents ($1.28) for each gallon or fraction thereof.

(d) Illicit Mixed Beverages.-A tax is levied on illicit mixed beverages sold by a dealer at the rate of twenty dollars ($20.00) on each four liters and a proportional sum on lesser quantities. (1989, c. 772, s. 1; 1995, c. 340, s. 1; 1997-292, s. 1.)

§105-113.107A. Exemptions.

(a) Authorized Possession.-The Tax levied in this Article does not apply to a substance in the possession of a dealer who is authorized by law to possess the substance. This exemption applies only during the time the dealer's possession of the substance is authorized by law.

(b) Certain Marijuana Parts-The tax levied in this Article does not apply to the following marijuana:

(1) Harvested mature marijuana stalks when separated from and not mixed with any other parts of the marijuana plant.

(2) Fiber or any other product of marijuana stalks described in subdivision (1) of this subsection, except resin extracted from the stalks.

(3) Marijuana seeds that have been sterilized and are incapable of germination.

(4) Roots of the marijuana plant.(1995,c.340, s.1; 1997-292, s.1.)

§105-113.108. Reports; revenue stamps.

The Secretary shall issue stamps to affix to unauthorized substances to indicate payment of the tax required by this Article. Dealers shall report the taxes payable under this Article at the time and on the form prescribed by the Secretary. Dealers are not required to give their name, address, social security number, or other identifying information on the form. Upon payment of the tax, the Secretary shall issue stamps in an amount equal to the amount of the tax paid. Taxes may be paid and stamps may be issued either by mail or in person. (1989,c. 772, s. 1; 1995, c.340, s.1; 1997-292, s.1.)

§105-113.109. When tax payable.

The tax imposed by this Article is payable by any dealer who actually or constructively possesses an unauthorized substance in this State upon which the tax has not been paid, as evidenced by a stamp. The tax is payable within 48 hours after the dealer acquires actual or construction possession of a non-tax-paid unauthorized substance, exclusive of Saturdays, Sundays, and legal holidays of this State, in which the tax is payable on the next working day. Upon payment of the tax, the dealer shall permanently affix the appropriate stamps to the unauthorized substance. Once the tax due on an unauthorized substance has been paid, no additional tax is due under this Article even though the unauthorized substance may be handled by other dealers. (1989, c. 772, s. 1; 1995, c. 340, s. 1; 1997-292, s. 1.)

§105-113.110: Repealed by Session Laws 1995, c. 340, s. 1, effective October 1, 1995.

§105-113.110A. Interest and penalty.

The tax due under this Article shall bear interest at the rate established pursuant to G.S. 105-241.1(i) from the date due until paid. In addition, a dealer who neglects, fails, or refuses to pay the tax due under this Article is liable for a penalty equal to fifty percent (50%) of the tax (1989 (Reg. Sess., 1990), c. 814, s. 7; 1995, c. 340, s. 1; 1997, c. 292, s. 1.)

§105-113.111. Assessments.

Notwithstanding any other provision of law, an assessment against a dealer who possesses an unauthorized substance to which a stamp has not been affixed as required by this Article shall be made as provided in this section. The Secretary shall assess a tax, applicable penalties, and interest based on personal knowledge or information available to the Secretary. The Secretary shall notify the dealer in writing of the amount of the tax, penalty, and interest due, and demand its immediate payment. The notice and demand shall be either mailed to the dealer at the dealer's last known address or served on the dealer in person. If the dealer does not pay the tax, penalty, and interest immediately upon receipt of the notice and demand, the Secretary shall collect the tax, penalty, and interest pursuant to the procedure set forth in G.S. 105-241.1(g) for jeopardy assessments or the procedure set forth in G.S. 105-242, including causing execution to be issued immediately against the personal property of the dealer, unless the dealer files with the Secretary a bond in the amount of the asserted liability for the tax, penalty, and interest. The Secretary shall use all means available to collect the tax, penalty, and interest from any property in which the dealer has a legal, equitable, or beneficial interest. The dealer may seek review of the assessment as provided in Article 9 of this Chapter. (1989, c. 772, s. 1; 1989 (Reg.

Sess., 1990), c. 1039, s. 2; 1991 (Reg. Sess., 1992), c. 900, s. 20(d); 1995, c. 340, s. 1.; 1997-292, s. 1.)

§105-113.112. Confidentiality of information.

Notwithstanding any other provisions of law, information obtained pursuant to this Article is confidential and may not be disclosed or, unless independently obtained, used in a criminal prosecution other than a prosecution for a violation of this Article. A person who discloses information obtained pursuant to this Article is guilty of a Class 1 misdemeanor. This section does not prohibit the Secretary from publishing statistics that do not disclose the identity of dealers of the contents of particular returns or reports. (1989, c. 772, s. 1; 1993, c. 539, s. 702; 1994, Ex. Sess., c. 24, s. 14 (c); 1997, c. 292, s. 1.)

§105-113.113. Use of tax proceeds.

(a) Special Account.- The Secretary shall credit the proceeds of the tax levied by this Article to a special nonreverting account, to be called the State Unauthorized Substances Tax Account, until the tax proceeds are unencumbered. The Secretary shall remit the unencumbered tax proceeds as provided in this section on a quarterly or more frequent basis. Tax proceeds are unencumbered when either of the following occurs:

(1) The tax has been fully paid and the taxpayer has no current right under G.S. 105-267 to seek a refund.

(2) The taxpayer has been notified of the final assessment of the tax under G.S. 105-241.1 and has neither fully paid nor timely contested the tax under G.S. 105-241 through G.S. 105-241.4 or G.S. 105-267.

(b) Distribution.- The Secretary shall remit seventy-five percent (75%) of the part of the unencumbered tax proceeds that was collected by assessment to the State or local law enforcement agency that conducted the investigation of a dealer that led to the assessment. If more than one State or local law enforcement agency conducted the investigation, the Secretary shall determine the equitable share for each agency based on the contribution each agency made to the investigation. The Secretary shall credit the remaining unencumbered tax proceeds to the General Fund.

(c) Refunds.-The refund of a tax that has already been distributed shall be drawn initially from the State Unauthorized Substances Tax Account. The amount of refunded taxes that had been distributed to a law enforcement agency under this section and any interest shall be subtracted from succeeding distributions from the Account to that law enforcement agency. The amount of refunded taxes that had been credited to the General Fund under this section and any interest shall be subtracted from succeeding credits to the General Fund from the Account. (1991 (Reg. Sess., 1992), c. 900, s. 20(c); 1995, c. 340, s. 1; 1997-292, s. 1.)